IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 10-0084

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST,

APPELLANT AND THIRD PARTY RESPONDENT,

v.

SHELLY WEIDOW,

APPELLEE AND PETITIONER,

v.

UNINSURED EMPLOYERS' FUND,

APPELLEE AND RESPONDENT/THIRD-PARTY PETITIONER

APPELLEE SHELLY WEIDOW'S RESPONSE BRIEF

ON APPEAL FROM THE MONTANA WORKERS' COMPENSATION COURT
CAUSE NO. WCC NO. 2007-1863
THE HONORABLE JAMES JEREMIAH SHEA

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STATEMENT OF THE CASE

Appellant Bradley Howard/Howard Family 1995 Trust ("Howard") seeks review of two decisions from the Montana Workers' Compensation Court ("WCC"). Primarily, the WCC was correct that the federal income tax treatment of Howard's Montana properties negates its "casual employment" defense to the failure to secure workers' compensation coverage for his employees.

Secondly, although Howard chose not to participate in briefing the issue at the WCC, Howard now challenges the WCC's decision finding a procedural statute to be unconstitutionally vague. The Uninsured Employer's Fund ("UEF") which raised this issue with the WCC is not participating in this appeal. Further, recognizing the ambiguity, the 2009 Montana legislature amended the statute.

STATEMENT OF FACTS

I. CASUAL EMPLOYMENT.

Appellee, Shelly Weidow ("Weidow"), was injured on June 13, 2006, when he was pinned and pressed by a malfunctioning dumbwaiter at a Yellowstone Club property in development. (FFCLJ ¶¶ 18-19). At the time of the accident, Weidow was a finish carpenter working directly for Howard. (Tr. 173:4-9;174:8-9). Howard had no workers' compensation coverage in effect when Weidow was injured. (FFCLJ ¶ 20). Howard was concerned about workers' compensation

insurance for the project, but testified homeowner's insurance policies in California included workers' compensation coverage, and he assumed he was covered in Montana with his homeowner's policy. (Tr. 291:6-9, 18-21). Prior to the injury, Weidow and Howard discussed obtaining workers' compensation coverage, and Weidow got a quote of $16,000-$17,000, and Howard offered to pay half. (Tr. 293:15, 294:10). Weidow could not afford half and told Howard. (*Id.*). Howard told Weidow $17,000 was too much for workers' compensation when the house was so close to being completed and Howard would "take care of it." (Tr. 178:9-14; 203:17-23).

The Howard Family 1995 Trust holds the considerable assets of Bradley Howard, who makes a living owning and managing real estate in California and other states. (Tr. 227, 250-53, 324-26). The Trust was "created to own and operate real property." (FFCLJ ¶ 5). During a 2002 Yellowstone Club ski trip as the guest of Warren Miller, Howard got "turned on" to the Yellowstone Club. (Tr. 67:1-10; 257:15-17). Howard liked the "outrageous skiing" and the way in which the Club erases "social chains" and strips "somebody right down to the bare bones of who they are." (Tr. 257:17; 259:23-25). Mrs. Howard, however, "couldn't believe she met as many people [at the Club] that she actually liked. She thinks they're on a different level[.]" (Tr. 260:10-12).

The Howards, through the Trust, purchased a Yellowstone Club lot in 2004 using Trust assets. (FFCLJ ¶ 5; Tr. 35:12-15). Howard listed the property on his federal income tax returns on Schedule E, which is for reporting income and losses "from rental real estate, royalties, partnerships, S Corporations, estates, trusts, REMICs, etc." (Appellant's Appendix, Exhibit 5; Tr. 120:1-5). As the property was being developed, costs related to the house were being capitalized on the amortization/ depreciation schedules for Schedule E. (Tr. 124-126). Rental property can be capitalized while being developed, then depreciated over a number of years once the property is rented. (Tr. 125-126; 150:21-152:9). A depreciation deduction is not available to an owner of personal residential property. (Tr. 92:13-93:4). By listing the property tax on Schedule E, property tax deductions were improperly available to Howard which were not proper to deduct had the property been listed on Schedule A (for personal property) because of the Alternative Minimum Tax. (Tr. 128:4-10). The Yellowstone Club Property remained on Schedule E until December of 2007, well after Weidow was injured and well after Howard's tax treatment of this property became an issue in this case. (FFCLJ ¶ 95).

At the time of trial, Howard had not amended his tax returns to correct what he now characterizes as an error. (Tr. 434:16-18). Howard knew Schedule E was

for listing business and not personal properties. (Tr. 65:19-23). Howard tracks the basis of his personal home in California and his Ventura, California, beach house, but not on a Schedule E. (Tr. 64:15-22; 65:10-18). Like the Yellowstone Club house, Howard testified the Ventura beach house is "totally" a vacation home. (Tr. 255:21; 256:9).

Howard defeated Weidow's *Motion for Partial Summary Judgment* on the issue of casual employment by filing the affidavit of Howard's accountant, Lawrence Becker, CPA. In his affidavit, Becker swore the property was mistakenly listed on Schedule E as a "convenient means of tracking the underlying basis in the Home so that gain or loss in the event of a subsequent sale of the Home can be determined." (Tr. 440:10-14; Appellee's Appendix, Exhibit A). Inconsistently, Becker testified he mistakenly placed the Yellowstone Club property on Schedule E because Howard's bookkeeper had sent him information suggesting it belonged there and he neglected to discuss Howard's plans for the property with him for three years. (FFCLJ ¶ 79; Tr. 438:20; 439:7). It is not Becker's regular practice to track cost basis in personal property on Schedule E of a federal income tax return. (Tr. 440:15-25).

Becker left facts out of his affidavit the court was entitled to know, acknowledged the affidavit was partially wrong and, ultimately, he did not believe he wrote the affidavit. (Tr. 451:10-12; 455:21-23).

Expert witness Cindy Utterback, CPA, testified that using Schedule E is an inconvenient way to track cost basis because it takes extra steps to list a property on Schedule E. She is unaware of any accountants who track the basis of personal property on Schedule E. The mistaken assumptions Becker said he made in listing the property on Schedule E violate generally accepted accounting principles. (FFCLJ ¶ 62; Tr. 121-122; 133:13-22; 145:1-4; 159:13-17).

The WCC was "not persuaded" by Becker's explanation that Schedule E was used to track Howard's cost basis in the property. The WCC was "skeptical of Becker's assertion that he did not discuss the initial tax characterization of the property with Howard and then neglected to ask Howard about the property's intended use for three years." (FFCLJ ¶ 79).

Prior to acquiring the Yellowstone Property, Howard obtained a condominium at Big Sky in 2004 using "1031" exchange for rental property in California. He also improperly listed the condominium on Schedule E to take advantage of tax deductions available only to business property. (Tr. 32:13-33:8; 50:6-53:17; 143:19-144:25). A taxpayer cannot legally exchange, tax-free, a

commercial property for a personal one. (Tr. 143:24-144:4). Rather, the commercial property must be sold and capital gains taxes paid. Then a personal asset can be purchased with the realized funds. (Tr. 91:19-25). Howard had no intention of renting the condo when he purchased it through the like-kind exchange. (Tr. 33:9-11). He would let friends stay there and pay just the cleaning fee. (Tr. 33:23-34:3). He had "no profit motive of any sort" in the condo property when it was acquired. (*Id.*). He used the property for approximately 20-30 days per year including as a personal residence while his Yellowstone Club house was being built. (Tr. 38:4-7; 33:12-15).

As explained by Ms. Utterback, through his tax returns, Howard told the federal government the condominium "wasn't used for personal purposes more than the allowed number of days and that there aren't any limitations on the deductions that you can claim." (Tr. 140:1-5). She explained that if you rent a Schedule E property for less than fair market value, it counts as a personal use day, but that deductions on the condo were taken "as 100 percent business property." (Tr. 140-142).

Howard also keeps his airplane, which is used 60% for business purposes, licensed to his Montana properties in order to avoid paying taxes in California, where his businesses are based. (Tr. 76:2-14; 82:21-24; 115:3-16).

II. AMBIGUITY OF § 39-71-520 (2005), MCA.

Because there was no workers' compensation insurance when Weidow was injured, he made a claim for benefits with the UEF. (FFCLJ ¶20). On November 22, 2006, the UEF denied Weidow's claim for benefits, finding his employment with Howard was casual. Prior to the denial, the UEF never informed Weidow that casual employment was an issue and allow him to argue against it; nor did the UEF examine Howard's tax treatment of the property. (Appellant's Appendix, Exhibit 1, *Order Deeming Respondent's Motion to Dismiss to be a Motion for Summary Judgment, Denying the Motion for Summary Judgment and Declaring § 39-71-520(2), MCA, To Be Unconstitutional*, ¶ 3, ("Order"), Tr. 213:21-22; 214:23-215:6, 224:25-226:11).

On November 29, 2006, Weidow filed a mediation application with the Department of Labor & Industry, pursuant to §§ 39-71-520(1) and 39-71-2401, MCA. Mediation was held on January 4, 2007, and the mediator's report finding in favor of Weidow was mailed on January 31, 2007. *Order* ¶ 3.

Pursuant to § 39-71-2411(7), MCA, Weidow sent a February 21, 2007, letter accepting the mediator's report and conclusions. The UEF sent a February 21, 2007, letter rejecting the mediator's report. The party who will not accept the mediator's report must "petition the workers compensation court for resolution of

the dispute." Section 39-71-2411(7), MCA. When the UEF did not timely file a petition, Weidow filed a petition to move this matter forward on April 10, 2007, 69 days after the mediator's report was mailed. *Order* at ¶ 3.

The UEF moved to dismiss Weidow's petition because no petition was filed within 60 days from the mailing of the mediator's report, claiming its own denial of benefits was final pursuant to § 39-71-520(2), MCA. Section 520(2) states "If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the ***determination*** by the ***department*** is final." (Emphasis added).

The Workers' Compensation Act defines "department" as "the department of labor and industry." Section 39-71-116(11), MCA. Both the UEF and the mediator are contained within "the department." "Determination" is an undefined term. The WCC ruled the 60-day time limit prescribed in § 520(2) was unconstitutionally vague as applied here because it forces individuals of ordinary intelligence to guess at its meaning; it is unclear whether it is the mediator's determination or the UEF's determination that becomes final after 60 days. *Order* at ¶¶ 21-25. The Montana State Legislature corrected this ambiguity during the 2009 session.

Appellant Howard did not participate in the briefing on this issue at the WCC; the UEF, which did participate, filed a *Notice of Non-Participation* in this appeal on June 17, 2010.

STANDARDS OF REVIEW

Weidow generally agrees with the standards set forth in *Appellant's Opening Brief.* He would add, however, that "We have repeatedly held that this Court considers issues presented for the first time on appeal to be untimely and will not consider them. [internal citations deleted]. This includes new arguments and changes in legal theory. [internal citations deleted]. The rationale for this rule is that we refuse to fault a trial court 'for failing to rule correctly on an issue it was never given the opportunity to consider.'" *Molnar v. Montana PSC*, 2008 MT 49, ¶ 12; 341 Mont. 420; 117 P.3d 1048, citing *Day v. Paine*, 280 Mont. 273, 276; 929 P.2d 864, 866 (1995). Jurisdiction was unsuccessfully challenged below by the UEF, and Howard did not participate in the briefing. While subject matter jurisdiction may be challenged for the first time on appeal, in this case it was unsuccessfully challenged below. On appeal, if the Court allows any argument from Howard, he should be limited to presenting only the arguments offered by the UEF on the issue of jurisdiction.

Further, it is "well established this Court should avoid constitutional issues whenever possible." *State v. Adkins*, 2009 MT 71, ¶ 12; 349 Mont. 444; 204 P.3d 1. Because this Court upholds lower court's decisions when correct, "regardless of the lower court's reasoning in reaching its decision" this Court can resolve the jurisdictional question for Weidow by completing the statutory construction analysis the WCC abandoned after concluding § 39-71-520(2), MCA, is ambiguous and the legislative history gives no guidance as to the legislative intent. *Hagan v. State*, 265 Mont. 31, 35; 873 P.2d 1385, 1387 (1994). When legislative intent is unascertainable, this Court turns to public policy, which favors trial on the merits. *State ex. rel. Racicot v. First Judicial District Court*, 243 Mont. 379; 794 P.2d 1180 (1990); § 25-9-101, MCA.

Finally, if the Court decides a constitutional analysis of 39-71-520(2), MCA, is appropriate, Weidow does not believe he should have to prove the statute unconstitutional "beyond a reasonable doubt." The WCC held the statute is ambiguous because it is capable of two meanings as applied to the facts here. One of the interpretations inures to the benefit of Howard and the UEF, and the other inures to Weidow's benefit. If there are two meanings and both make sense, neither party should have such a burden of proof. Rather, the Court should first analyze the statute to see if the issue can be resolved without a constitutional

analysis. Weidow believes it can be decided on grounds other than constitutional. But if the Court disagrees, then the Court's constitutional analysis should not require a "beyond a reasonable doubt" standard in an as-applied challenge when two interpretations are reasonable. Regardless, the WCC was correct when it found the statute unconstitutionally vague beyond a reasonable doubt.

SUMMARY OF ARGUMENT

Under Montana law, Shelly Weidow was not Howard's "casual employee." *Colemore v. UEF*, 2005 MT 239; 328 Mont. 441; 121 P.3d 1007. Colemore, a Tennessee businessman who owned a hobby farm near Livingston, hired a Montanan to fix fence. The worker was killed. There was no workers' compensation insurance. Colemore claimed the work arrangement was "casual employment" and § 39-71-116(7), MCA, obviated the need for workers' compensation coverage.

This Court looked at Colemore's treatment of the hobby ranch in his federal tax returns, concluding he used it "as a tax write-off to decrease his federal income tax on other income-producing ventures. In spite of what Colemore would have us believe, the ranch was not maintained solely as a summer vacation home."

Howard owns three items of property in Montana: the Yellowstone Club house, the Big Sky condominium, and the airplane. The undisputed evidence

showed Howard listed these properties as business rental properties on his income tax returns to reduce his tax obligations. Howard's tax returns show he owns and operates a rental-property business from which he makes a lot of money. His Montana properties were treated, for tax purposes, the same as every other commercial property he owns.

Colemore looked to other decisions for the proposition that a business may be an activity engaged in by someone with "a view to winning a livelihood ***or gain***." *Colemore* at ¶19 (emphasis added). *Colemore* then approved a Texas case which held that to "come within the Workmen's Compensation Act" an employer need not necessary actually make a profit, but must have a profit motive. *Colemore* at ¶ 28, citing *Barlow v. Anderson*, 346 S.W.2d 632 (Tex. Civ. App. 1961). Here, the "gain" or "profit motive" is the same as *Colemore*: the reduction of overall tax liabilities by taking business deductions on property used as personal property. "The facts are sufficient to support the conclusion that Colemore operated the ranch with a profit motive, thereby qualifying Forgey's employment for Workers' Compensation coverage. See, *White v. Comm. of Internal Revenue* (6th Cir. 1955), 227 F.2d 779, 779 (a profit motive is necessary to deduct ordinary and necessary business expenses on a federal income tax return)." *Colemore* at ¶ 32. At trial, Howard's accountant agreed:

Q: Now, is it the case, Becker, that a profit motive is necessary to deduct ordinary and necessary business expenses on a federal income tax return?

A: That's correct.

(Tr. 468:19-23)

Howard's efforts to distinguish the facts here from *Colemore* fail because he cannot have it both ways – he cannot represent the property as a business to the IRS for preferential tax purposes, then claim his subjective intent to use the property for personal purposes controls the determination of this matter. "A person who takes the benefit shall bear the burden." Section 1-3-212, MCA. Howard took the tax benefits; he must bear the burden of failing to purchase workers' compensation coverage. This Court should reject Howard's suggestion that this Court ignore his willingness to violate federal law.

ARGUMENT

I. WEIDOW'S EMPLOYMENT WITH HOWARD WAS NOT "CASUAL."

A. Overview of Casual Employment and Howard's Burden of Proof.

Howard bears the burden of proof to prove his affirmative defense of "casual employment." Section 26-1-401, MCA. *Anderson v. Stokes*, 2007 MT 116, ¶ 19; 338 Mont. 118; 163 P.3d 1273. Howard has failed to present adequate

evidence he was not required to furnish workers' compensation coverage for his Montana employees. Therefore the WCC decision should be upheld.

Section 39-71-401(2)(b), MCA, exempts "casual employment" from the types of work for which workers' compensation coverage is required. Section 39-71-116(6), MCA, defines 'casual employment' as "employment not in the usual course of the trade, business, profession, or occupation of the employer." Casual employment determinations must be made "on a case by case basis and a single employer may, in fact, have more than one trade of business." *Colemore* at ¶ 22.

Over 75 years ago, this Court held a worker injured while building an addition to an apartment complex owned by a dentist was employed in the usual course of the dentist's business – as the owner and operator of a rental building. The worker's employment furthered the rental business. *Nelson v. Stuckey*, 89 Mont. 277, 286; 300 P. 287, 288 (1931).

The *Colemore* defendant "claim[ed] he leased the ranch as a hobby [but] he deducted all of the expenses of running the ranch as 'business' expenses on his Federal Income Tax Return. Therefore, even though he did not make a profit running the ranch, he did operate the ranch with a profit motive in mind – that of reducing his overall income tax through the business expenses he incurred while operating the ranch." *Colemore* at ¶ 28. "Perhaps most significantly, Colemore

deducted $140,983 from his federal income taxes in 2000 based on the agricultural deductions and depreciation claimed for both his Montana and Tennessee farming operations." *Colemore* at ¶ 31. (emphasis added).

Colemore agreed with the Texas court in *Barlow*, the profit motive was "an important characteristic of an operation such as the one we are here considering in order to come within the designation of a trade, business, profession or occupation." *Id.* In *Barlow*, a woman's "very expensive hobby" of raising race horses was not found to be a business because she spent a lot of money on her horses and won minimal prizes in races. There was no evidence she represented her horse hobby as a business to the IRS.

Contrary to Howard's assertion, the *Colemore* court did not set forth a three-part test for determining when the casual employment exception in workers' compensation exists. It remains a "vague and shadowy" concept which must be decided on a case-by-case basis. *Colemore* at ¶ 22. Here, for the reasons shown at trial, Weidow's work for Howard was not casual.

B. The WCC Relied on Substantial Credible Evidence in Finding Howard Had a Profit Motive in the Yellowstone Club Property.

Howard argues "[t]he record shows the WCC relied on a mere scintilla only – Howard's 2004 and 2005 tax returns – to determine the vacation home was a

business under *Colemore*." *Appellant's Opening Brief* at 36. Howard argues that his own federal income tax returns, signed under penalty of perjury, "deserve little weight." *Id.* He is wrong about these arguments: "Howard used his Montana properties as part of a 'business' as defined in *Colemore*: 'with a view to winning ... a gain.'" (FFCLJ ¶ 96).

Substantial credible evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Liberty Northwest v. Montana State Fund*, 2009 MT 386, ¶ 13; 353 Mont. 299; 219 P.3d 1267. The WCC's findings are based upon Howard's misrepresentations to the federal government that he was entitled to take tax deductions to reduce his tax obligations. He cannot have it both ways. "A person who takes the benefit shall bear the burden." Section 1-3-212, MCA.

Howard attempts to explain why this Court should ignore his tax returns. First, Howard claims that "the property was mistakenly placed on Schedule E of those returns due to a lack of direct communication between [his accountant and himself]." *Appellant's Opening Brief* at 37. Second, Howard claims that because he only realized a $2,000 tax deduction, "The minimal tax deduction on Schedule E for property tax of the undeveloped lot does not rise to 'substantial evidence[.]'"

Id. at 37. Third, with respect to the tax treatment deduction taken of his personal condominium property, "The record mandates the conclusion that the condominium was intended from the beginning to be either a short-term investment or a rental property once Howard was able to move into his completed vacation home." *Id.* at 38. Fourth, Howard argues the WCC should not have considered his decision to register in Montana his airplane that is used 60% for business. *Id.* at 39.

With these arguments, Howard recognizes at least four facts the WCC considered when it found this was not casual employment. Two of the facts show a profit motive on the Yellowstone Property: first, the property that cost $1,143,489 was on Schedule E as rental property; and second, Howard realized a tax deduction on the property. The other two facts show a pattern he would have continued to claim the Yellowstone Property on Schedule E had Weidow not been injured: first, he had previously put his personal condominium on Schedule E as rental property; and, second, he registered his airplane in Montana to gain a tax advantage. This evidence alone shows a systemic approach to Howard's taxes to take deductions he should not. Further, all of these deductions were taken, under penalty of perjury, as business properties. Howard's attempt to have these facts viewed individually and in isolation should be rejected.

Howard's actions after October 12, 2007, when Weidow moved for partial summary judgment on the casual employment and independent contractor issues, provide more evidence against Howard. Weidow based his motion on Howard's tax treatment of the Yellowstone Club property. (*Brief in Support of Motion for Partial Summary Judgment)* Appellee's Appendix, Exhibit B, pp. 16-18. Two months later, in December, Howard told his accountant to move the property off Schedule E. (FFCLJ ¶ 78; Tr. 456:22-457:4). Howard's attempt to avoid liability by moving his Yellowstone Club property to Schedule A in tax year 2006 was too little too late because this change took place "only after this litigation began and at the time of trial had not corrected his previous tax returns." (FFCLJ ¶ 95). In fact, Howard acknowledged he could have first become aware the property was improperly listed on Schedule E because of this pending litigation. (FFCLJ ¶ 51).

Further evidence is provided because Howard filed his 2005 tax return after Weidow's injuries and listed the Yellowstone Property on Schedule E. Howard filed his tax returns in October, not April. (Tr. 48:21-24; 425:24-426:10). (FFCLJ ¶ 76). Weidow was injured on June 13, 2006. (FFCLJ ¶¶ 18-19). Therefore, when he filed his 2005 tax return four months after Weidow's accident, Howard represented to the federal government the Yellowstone Club property was rental income property.

Relying upon this substantial credible evidence, the WCC correctly found:

> Howard treated the Big Sky condominium in a similar manner, treating it for tax purposes as if it were a rental property while actually using it as a personal residence with no intention of renting it. Clearly, Howard received significant tax benefits for doing so. Howard purchased and maintained property in Montana not merely for recreational purposes but because he was able to achieve significant tax savings by deducting expenses associated with these properties from his taxes and by using the Yellowstone Club property as the registration address for his airplane. As reflected in Howard's testimony and in his tax returns, Howard used his Montana properties as part of a "business" as defined in *Colemore*: "with a view to winning ... a gain." While Howard did not develop the Yellowstone Club property solely for business purposes, the statute and case law does not require that he do so, but only that it be part of his usual course of trade, business, profession, or occupation. I conclude that Howard's use of the Yellowstone Club property, particularly in his use of that property for advantageous tax purposes, was part of Howard's usual course of trade, business, profession, or occupation. Therefore, Weidow's work on that property was not "casual employment" within the meaning of § 39-71-116(6), MCA, and was not exempt from workers' compensation insurance coverage.

C. Howard Could Not Have Taken the Yellowstone Club Deductions on Schedule A Without Violating Federal Tax Law Because of the Alternative Minimum Tax.

Howard argues that "other than a property tax deduction that could have been realized under Schedule A, there were no additional business expense deductions taken in relation to the construction or maintenance of the vacation home." *Appellant's Opening Brief* at 33. However, even Howard's accountant agreed that in 2005, Howard was subject to the alternative minimum tax and the

deduction for residential property taxes would not have been available on Schedule A. (FFCLJ ¶ 64; Tr. 434:6-14). As stated previously, this Court should reject Howard's suggestion that this Court ignore his willingness to violate federal law.

Moreover, additional deductions were not available to Howard because he was capitalizing the costs of building the Yellowstone Club house in order to depreciate them. Business expenses may be deducted. 26 U.S.C. §§ 162, 167[1], 263[2]. However, capital expenses, such as those incurred in building a business property, must be capitalized and depreciated over time. 26 U.S.C. §§ 167, 168; 26 CFR 1.168, *et seq*. Howard's capitalization of costs incurred in building the Yellowstone Club home would be proper only if it were rental income property. If not, then no deductions whatsoever were available to him on Schedule E for the Yellowstone Property. Nonetheless, he listed them on Schedule E to reduce his taxes and make a profit.

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[1] There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) – (1) of property used in the trade or business, or (2) of property held for the production of income.

[2] "General rule: No deduction shall be allowed for - (1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."

Howard's accountant testified regarding deductions available to Howard. He admitted the only two types of insurance that could be deducted, workers' compensation coverage and liability insurance on raw land, were not available as "additional business expense deductions" to Howard. (Tr. 447:1-450:18; 453:16-455:23). By contrast, Becker identified actual expenses Howard incurred which could not be deducted but had to be (and were) capitalized. These included legal fees, professional fees, utilities, and construction insurance for legitimate rental property. *Id.* This shows Howard and his accountant understood what was and was not available for inclusion on Schedule E and nonetheless included the Yellowstone Property for improper financial advantage.

D. The WCC Correctly Identified Howard's Rental Business and Determined Shelly Weidow Was Working for Howard's Rental Business.

Howard complains the WCC failed to adequately identify his business as a rental business. *Appellant's Opening Brief* at 28. To the contrary, the WCC found that Howard Family 1995 Trust was created "to own and operate real property[.]" (FFCLJ ¶ 5). The trust is a separate legal entity from Bradley Howard. It lives on after Bradley Howard dies. "Increasingly, the modern common law and statutory concepts and terminology tacitly recognize the trust as a legal 'entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the

beneficiaries." *Restatement (Third) of Trusts*, § 2, comments ¶ 2. It was the Howard Family 1995 Trust for which Weidow was working and being paid $33 per hour when he was injured. (FFCLJ ¶¶ 14 & 100).

The evidence is clear that the Howard Family 1995 Trust's business was owning and operating the rental properties listed on Schedule E. Howard's trust owns many business assets. Howard's trust generates vast sums of money for Howard's use every year, mostly from rental income on his numerous commercial assets. Out of respect for Howard's privacy, Weidow is not attaching Howard's voluminous tax returns to *Appellee's Appendix*. However, the Court has the WCC record, and the tax filings are Trial Exhibit 14, should the Court decide to examine them itself. Listed on Schedule E for 2005, for example, are 14 rental properties.

Both Howard's accountant and Ms. Utterback agree that "Schedule E is used solely for rental property." (FFCLJ ¶¶ 48, 77, & 61). Ms. Utterback explained "if a property is not intended to be used as a rental property and is not used in a trade or business, it belongs on Schedule C with its associated deductible expenses placed on Schedule A." (FFCLJ ¶ 61).

The assertion that the Trust "does not hold his business assets" is completely unfounded. While it is true Howard owns several other businesses outside of the

Trust, which hold even more business properties from which he benefits, the notion the Trust only contains personal property is belied by the Schedule E filings.

Howard blames his accountant for the "error" and claims "This error was corrected as soon as Howard became aware of it." However, Howard is responsible for the acts of his agents, including his accountant. Further, it is Howard who signed the tax returns listing the property as business property. Finally, contrary to his assertions in *Appellant's Opening Brief*, Howard never "corrected" the errors; he simply stopped making them after Weidow sought summary judgment based upon the tax treatment of the Yellowstone Club property. (See, Tr. 456:5-457:7; FFCLJ ¶ 95). As explained below, the testimony from Howard's accountant does not support it was an accounting error that resulted in listing the Yellowstone Property on Schedule E. It was very intentional.

Weidow's carpentry work was labor clearly in furtherance of Howard's rental business. The Yellowstone Club house could not be "placed into service" and Schedule E depreciation started until the house was finished. All the expenses incurred on the property were being capitalized on the federal income tax return's amortization and depreciation schedules. The whole point of Weidow's work at the house was to get it completed after Howard and his contractor had a falling out. (FFCLJ ¶¶11 & 12).

Once the Yellowstone Club house was completed and placed into service, the total capitalized costs could be depreciated over 27.5 years. Howard invested several million dollars into the Yellowstone Club property. This would have resulted in an annual depreciation deduction that would have been many tens of thousands of dollars and could have reached into six figures per year.

This is far more money than the average Montanan earns in a year. The deduction was not available until the house was completed and placed into service. Weidow's work at the house was aimed entirely at getting it completed so that Howard could move in and begin taking the depreciation deduction.

In *Nelson*, this Court found that the injured workman was injured while laboring to enlarge the employer's rental business. The same can be said here.

E. Becker's Telephonic Participation in the Hearing is Irrelevant.

Appellant complains the WCC assigned less evidentiary weight to Howard's accountant because he testified telephonically. *Appellant's Opening Brief* at 11. Howard "does not challenge the WCC's assignment of weight or credibility in this appeal." *Id.*, fn 11. Although he does not challenge the WCC's view of the accountant's testimony, Howard attempts to negate it and a response is warranted.

It is important to recognize that the accountant's affidavit was filed to defeat summary judgment on the issue of casual employment and was the only evidence

propelling this matter to trial. *Order Denying in Part and Granting in Part, Petitioner's Motion for Partial Summary Judgment* at ¶¶ 28, 34-36. (Appellee's Appendix, Exhibit C). As a result, it was a focus of his testimony at trial. (See, Tr. 442:10-20). Significantly, Howard testified he believed everything in the affidavit was correct. (Tr. 31:1-6).

The WCC was justifiably skeptical of Becker's testimony that he placed the Yellowstone Club Property on Schedule E of the federal income tax returns "merely to keep track of the basis in the property when there was also clearly a tax advantage for doing so. I am skeptical of Becker's assertion that he did not discuss the initial tax characterization of the property with Howard and then neglected to ask Howard about he property's intended use for three years." (FFCLJ ¶ 79).

On cross-examination, Becker testified inconsistently. He stated the property was unintentionally listed on Schedule E because he received misinformation from Howard's bookkeeper indicating the property was a rental. (FFCLJ ¶ 79, 438:20-439:7). He also testified the property was intentionally listed on Schedule E because it was a "convenient means of tracking the underlying basis in the Home so that gain or loss in the event of a subsequent sale of the Home can be determined." (Tr.440:10-14; Appellee's Appendix, Exhibit A). His testimony

that the property was unintentionally intentionally listed on Schedule E should be viewed, at a minimum, with skepticism.

Unlike his treatment of the Yellowstone Property, Becker's regular practice does not include tracking cost basis in personal property on Schedule E (Tr. 440:15-25) nor does he track the cost basis in Howard's other properties. (Tr. 445:20-22). Ms. Utterback knows of no accountant who tracks basis in property on Schedule E. (FFCLJ ¶ 62). Ultimately, Becker recognized his affidavit left out facts the court was entitled to know, the affidavit was wrong and, ultimately, he did not believe he wrote the affidavit. (Tr. 451:10-12, 455:21-23).

Taking these facts together, the WCC was correctly "skeptical of Becker's assertion that he did not discuss the initial tax characterization of the property with Howard and then neglected to ask Howard about the property's intended use for three years." (FFCLJ ¶ 79). Howard's decision to have the accountant testify by telephone did not affect the outcome at the WCC, nor is it relevant to this Court's decision. The WCC's skepticism about Becker's testimony stems from more than his telephonic appearance. The lack of a credibility finding is not error; it is the result of a litigation decision made by Howard and the inconsistent testimony from Becker.

It is clear that even if Becker had appeared in person and provided the same testimony he provided by telephone, the Court's findings would still be well supported by the testimony. The Court was not skeptical because he testified by telephone. It was skeptical because his testimony was impeached – by his own testimony.

II. THE WORKERS COMPENSATION COURT CORRECTLY FOUND § 39-71-520(2), MCA, IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE FACTS OF THIS CASE; HOWEVER, A CONSTITUTIONAL DETERMINATION IS NOT NECESSARY TO RESOLVE THE ISSUE.

Since the WCC decision declaring § 39-71-520(2), MCA, unconstitutional, the legislature recognized the statute's ambiguity and amended it to resolve this problem. When this matter was mediated and litigated, § 39-71-520, MCA (2005), read:

> **39-71-520. Time limit to appeal to mediation - petitioning workers' compensation court - failure to settle or petition.** (1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination by the department or the determination is considered final.
> (2) (a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the department's determination may file a petition before the workers' compensation court.
> (b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-241 1 unless the parties stipulate in writing to a longer time period for filing the petition.

> ***(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.***

(Emphasis added). The Workers' Compensation Act defines "the department" as the Department of Labor and Industry. Section 39-71-116(11)(2005), MCA. The mediation unit and UEF are part of the Montana Department of Labor and Industry. *Order* ¶ 9; § 39-71-2411(1), MCA. Because "determination" was not defined by statute, the ambiguity existed. Recognizing the ambiguity in the statute, the 2009 legislature added subsection (2)(d) and defined "determination":

> ***(d) A mediator's report is not a determination by the department for the purposes of this section.*** A determination by the department is final if an appeal to mediation described in subsection (1) or a petition described in subsection (2)(a) is not filed within the required time period.

(Emphasis added). The legislature added (d) because (c) was not clear. Attached is the legislative history of the 2009 amendment to § 39-71-520(2), MCA. (Appellee's Appendix, Exhibit E). Again, testimony addressing the bill comes from Jerry Keck of the Department of Labor and Industry. He stated to both House and Senate that the DLI seeks to "clarify that language" in § 520(2).

Even the added language of (d), however, shows a mediator's report <u>is</u> a determination by the department; it is just no longer a determination for purposes of § 39-71-520, MCA. Clearly, the legislature was concerned that a reasonable

reading of the 2005 version without (d) made the mediator's report final if no petition is filed in the WCC within 60 days of the mailing of that report.

Section 39-71-2711, MCA, which is cross-referenced by § 39-71-520(2), MCA, requires the party which disagrees with the mediator's report to file the petition in the WCC. In this case, it was the UEF which disagreed with the mediator's report.

The facts of this case show Weidow was not derelict in failing to file a WCC petition within 60 days – he was waiting for the UEF as the party which disagreed with the mediator – to do so to avoid the mediator's report becoming final:

> Clearly, Petitioner's attorney believed the mediator's report, and not the UEF's determination, would become final if Petitioner did not file a petition within 60 days after the mediator mailed her report. This is evidenced by his February 21, 2007, letter to the department mediator in whcih Petitioner's attorney thanked th mediator for her 'mediation report and recommendation' and noted his acceptance of her decision. Petitioner's attorney also requested the mediator 'issue [her] decision as soon as possible' so the matter could conclude.

Order at ¶23.

Weidow's interpretation of the statute was especially reasonable given the "mediator's report" was the critical document in § 39-71-520(2), MCA. The timeliness of a party's petition to the WCC was adjudged based on the mailing of the mediator's report. It was to the mediator the parties to a mediation send notice

of whether or not they agree with the decision. Section 39-71-2511(7), MCA. The mediator is an employee of "the department."

Howard argues it is the decision of a different part of "the department" which should actually be made effective. Howard's argument that the statute can only be read to unambiguously require Weidow to file the petition within 60 days must fail. As the WCC noted, "the statute implies the UEF may at times have incentive to file a petition. However, the UEF would have incentive to petition the WCC only if the mediator's report becomes final absent a petition being filed with the WCC." *Order* at ¶ 21. Otherwise, the UEF can simply wait to see how many claimants fall into an ambiguous procedural trap.

The WCC is correct that, as applied to the facts of this case, the 2005 version of § 39-71-520(2), MCA, is unconstitutionally vague because it "does not sufficiently define the required conduct, and men of common intelligence must necessarily guess at its meaning." However, a constitutional finding is not necessary.

As Weidow argued to the WCC, the statute is not only vague, but ambiguous. Because the statute is subject to two reasonable interpretations, the legislative history is unhelpful and the statute is a statute of limitations, Montana

law requires an available longer statute of limitations to apply. Here, the statute of limitations is the two-year time limit prescribed by § 29-71-2905, MCA.

A. The Statute Is Void for Being Ambiguous; The Legislative History is Undeterminable.

The WCC correctly found the statute is unclear on its face and examined the legislative history. *Order* at ¶8. The legislative history, in turn, "provides little insight into the intent of the legislature, [and] actually adds further confusion and ambiguity to the statute's meaning." *Order* at ¶ 10. Specifically:

> ... nothing in the history sheds any light on whether the UEF's determination or the mediator's report becomes final if a petition is not filed in the WCC within 60 days. In reviewing the legislative history submitted by the parties, I find nothing indicating the legislature intended to change a claimant's right and time frame to file a claim against the UEF. Similarly, nothing in the legislative history indicates the legislature intended to allow UEF's denial of benefits to become final if a claimant did not file a petition within 60 days of the mailing of the mediator's report.

Order at ¶ 11. The WCC then found the statute unconstitutional. However, before considering the constitutionality of the statute, Weidow believes a statutory construction analysis will result in this Court's conclusion the petition was filed timely and WCC jurisdiction was proper.

When a provision is "reasonably susceptible" to more than one interpretation, "we conclude it is ambiguous and turn to the legislative history for

assistance in determining the legislative intent." *In re KMG*, 2010 MT 81, ¶ 28; 356 Mont. 91; 229 P.3d 1227. Montana law requires "In the construction of a statute, the intention of the legislature is to be pursued if possible." Section 1-2-102, MCA (emphasis added). The statutes of the State of Montana are "to be liberally construed with a view to effect their objects and promote justice." Section 1-2-103, MCA. "An ambiguous statute of limitation should be interpreted, in the interest of justice, to allow the longer period in which to prosecute the action." *Eisenmenger v. Ethicon, Inc.*, 264 Mont. 393; 871 P.2d 1313 (1994). The law abhors forfeiture. *SAS Partnership v. Schafer*, 200 Mont. 478, 485; 653 P.2d 834 (1982).

Here, as the WCC noted, it is not possible to ascertain the legislative intent. The legislative history is attached to the Appellee's Appendix as Exhibit D. What became codified as § 520(2) is part of a potpouri bill fixing various portions of the Workers' Compensation Act. The only testimony advancing the bill came from Jerry Keck of the Department of Labor and Industry. The law was proposed because of a problem with uninsured employers waiting two years to petition the WCC to determine their cases. During this time, the UEF was paying an injured worker benefits, but unable to seek reimbursement of such expenditures from the employer. Keck's submitted testimony states:

> Section 5 sets a 60-day time limit for filing a petition in the workers' compensation court after the mailing of the mediator's report. This is important to move the case to a legally binding determination that the employer is liable for the debt so the Department can seek to collect it.

(Appellee's Appendix, Exhibit D, 1995 Legislative History of § 520(2)).

Clearly, the legislative history shows the purpose of the bill was to allow the UEF to move its cases along more quickly in order to pursue indemnity claims against uninsured employers. The history does not show whether the legislature intended the UEF decision or the mediator's decision to become final - merely the decision reached by "the department."

When this Court cannot ascertain intent using statutory construction, it looks to public policy to guide its decision. *State ex. rel. Racicot v. First Judicial District Court*, 243 Mont. 379; 794 P.2d 1180 (1990). The public policy of the State of Montana favors trial on the merits. Section 25-9-101, MCA. Montana public policy also favors finding in favor of workers' compensation coverage (although not necessarily in favor of finding benefits). See, *In re Workers' Compensation Death Benefits of Gaither*, 244 Mont. 383; 797 P.2d 208 (1990); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 163; 855 P.2d 506, 516 (1993) (Trieweiler, J., dissenting).

Further, when an ambiguous statute operates to penalize a party, this Court will not apply it. "Statutes which impose penalties, either civil or criminal, must be clear and explicit, and where such statutes are so vague and uncertain in their terms as to convey no meaning, or if the means of carrying out those provisions are not adequate or effective, the courts must declare the penal provisions void." *Missoula High School v. Superintendent*, 196 Mont. 106; 637 P.2d 1188, 1192 (1981).

If void under the facts of this case due to its ambiguous nature, then the general statute of limitations governing petitioning the WCC applies and Weidow's petition was timely. Section 39-71-2905(2)(2005), MCA, states "A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." This alternate statute of limitations should also be applied under *Eisenmenger* because "An ambiguous statute of limitations should be interpreted, in the interest of justice, to allow the longer period in which to prosecute the action." While *Eisenmenger* applied to a single statute which could be read to allow two different amounts of time, the reasoning is the same here and the availability of § 39-71-2905, MCA, bolsters its application.

Accordingly, this Court should avoid a determination of constitutional gravamen by voiding the ambiguous statute of limitations under existing Montana law, applying the longer statute of limitations provided at § 39-71-2905(2), MCA,

and holding Weidow's petition timely. Nonetheless, should this Court choose to address the constitutional issue, the WCC's analysis should be affirmed.

B. The Workers' Compensation Court Correctly Found § 39-71-520(2), MCA, is Unconstitutionally Vague As Applied to the Facts of this Case.

1. Howard Did Not Brief This Issue to the WCC; at a Minimum, He is Bound to the UEF's Argument.

Even though Howard chose not to participate in briefing this issue to the WCC, he now seeks to defeat WCC jurisdiction by arguing it erred when it found the procedural statute to be unconstitutionally vague. Because Howard failed to brief any arguments on this issue to the WCC, Howard's arguments that go beyond what the UEF presented to the WCC should not be considered by this Court. "We have repeatedly held that this Court considers issues presented for the first time on appeal to be untimely and will not consider them. [internal citations deleted]. This includes new arguments and changes in legal theory. [internal citations deleted]. The rationale for this rule is that we refuse to fault a trial court 'for failing to rule correctly on an issue it was never given the opportunity to consider.'" *Molnar v. Montana PSC*, 2008 MT 49, ¶ 12; 341 Mont. 420; 117 P.3d 1048, citing *Day v. Paine*, 280 Mont. 273, 276; 929 P.2d 864, 866 (1995).

The UEF limited its argument to a relatively simple assertion that the statute is clear on its face. There is a total of seven paragraphs of argument directed at the issue of vagueness in the UEF briefs. The arguments presented by Howard on appeal are largely new and never offered to the WCC when it was considering this issue. See *UEF's Motion to Dismiss* and *UEF's Reply to Petitioner's Answer Brief in Opposition to UEF's Motion to Dismiss,* (Appellee's Appendix, Exhibit F).

2. The WCC Was Correct When It Held That Whether Viewed Alone or As A Part of the Workers' Compensation Act As a Whole, § 39-71-520(2), MCA, is Unconstitutionally Vague.

Howard argues alternatively the statute is either not ambiguous at all, or when viewed in conjunction with other statutes, any ambiguity becomes clear. Howard's arguments are unpersuasive.

The Montana Workers' Compensation Act is "intended to be primarily self-administering" and "designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities." Section 37-71-105(4), MCA. Despite that admonishment, the Act includes a procedural statute that generated considerable confusion in this case and was held to be unconstitutionally vague, as applied to the facts here. Although this Court reviews legal determinations *de novo,* this Court should consider that the Judge who is charged with knowing more about workers' compensation law than any other judge in the State of Montana

ruled the statute was ambiguous and vague. If a recognized expert Judge finds the statute confusing, how is a non-lawyer going to find it otherwise?

"A statute violates due process for vagueness when language does not sufficiently define the required conduct, men of common intelligence must necessarily guess at its meaning." *Rierson v. State*, 188 Mont. 522, 526; 614 P.2d 1020, 1023, citing *United States v. Powell*, 423 U.S. 87 (1975). See, also, *In re Mont. Pacific Oil and Gas Co.*, 189 Mont. 11; 614 P.2d 1045 ("The due process test for vagueness of a statute is whether the law is so vague, uncertain that men of common intelligence must guess at its meaning.").

Howard concedes the WCA describes mediators as making a "determination" in regards to a party's level of cooperation during the mediation process. Aside from § 39-71-520, MCA, the UEF is nowhere else described in the WCA as making a "determination." "When the legislature has not defined a statutory term, the supreme court considers the term to have its plain and ordinary meaning. To determine the meaning of a statutorily undefined term, the supreme court may consider dictionary definitions, prior case law and the larger statutory scheme in which the term appears." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18; 354 Mont. 15; 221 P.3d 666.

Black's Law Dictionary (9th ed. 2009) defines "determination" as "A final decision by a court or administrative agency." As both the mediator and the UEF are nonjudicial branches of the same administrative agency, the definition is unhelpful. However, the term suggests that there is a neutral party making a decision based on the merits and an opportunity to participate. In this case, that did not occur until the mediation, which Weidow won. That mediation was Weidow's first opportunity to address the issue of casual employment.

At trial, the UEF claims adjuster, Bernadette Rice, testified that neither Weidow or his counsel were informed that casual employment was an issue in the UEF's consideration of his right to benefits. (Tr. 224:25-226:11). As such, Weidow never presented an argument to the UEF on this issue. Rice testified that she was aware of this Court's *Colemore* decision but never asked to look at Howard's tax returns – the critical evidence in *Colemore*. (Tr. 213:21-22; 214:23-215:6). Had she done so, she testified she probably would have decided against Weidow anyway. (Tr. 232:4-10).

If a determination means a determination by a nonadversarial party and a fair opportunity to participate, the UEF's decision to deny Weidow benefits based on "casual employment" cannot qualify. Further, it makes sense that the mediator's

decision would be more likely a "determination" to a person of "common intelligence" when reading the statute.

Howard repeatedly cites to *Montana Media, Inc. v. Flathead County*, 2003 MT 23; 314 Mont. 121; 63 P.3d 1129. That case does not apply here. In *Montana Media*, an outdoor billboard company challenged Flathead County regulations that limited outdoor billboard advertising. The company made facial constitutional challenges to the regulations based on freedom of commercial speech, prior restraint of speech, due process and equal protection. The billboard company facially challenged the "vagueness" of an exception to the regulations for political signs. The Court found nothing vague about the exception. It presents a wholly different case than the one here.

As stated above, Howard makes a series of new arguments aimed at demonstrating the statute is not unconstitutional. In essence, he concedes the statute is ambiguous but that because it is reasonable to read the statute to mean "the department" means the UEF, it is not unconstitutional. This is not the standard for an as-applied vagueness challenge. Further, under Howard's argument, no statute could be both ambiguous and vague – the one excludes the other.

Further, as explained above, Weidow does not believe he should have to prove the statute unconstitutional "beyond a reasonable doubt." One of the

interpretations inures to Howard and the UEF's benefits and the other inures to Weidow's benefit. If there are two meanings and both make sense, neither party should have such a burden of proof. Rather, the Court should first analyze the statute to see if the issue can be resolved without a constitutional analysis. Weidow believes it can be decided on grounds other than constitutional. But if the Court disagrees, then the Court's constitutional analysis should not require a "beyond a reasonable doubt" standard for any party when two interpretations are reasonable.

Next, Howard makes another new argument that because Weidow did not "necessarily" have to guess at the statute's meaning, the WCC should be reversed. Howard makes the desperate argument that if a claimant harbors doubts about who must appeal to the WCC, the claimant could simply call the Department of Labor and Industry and ask what the statute means.

First, this argument presumes a claimant who reads the statute two ways and believes the statute is confusing will call the Department. A claimant who reads the statute to mean "the department" is the mediator and not the UEF would not believe he/she was confused. Further, since the cross-referenced statute at § 39-71-2411, MCA, requires the party who disagrees with the mediator's decision to

file the WCC petition, why would a claimant who agrees with the mediator "harbor doubts" about who is required to act?

Second, if the claimant calls the Department, this argument presumes the Department has the power to conclusively interpret statutes, the caller will speak to someone who has the training and power to conclusively interpret the statute, and the Department's statutory interpretations will always be legally correct. Finally, it assumes that the person at the Department will interpret the way Howard wants it interpreted and not the way Weidow interpreted it. This argument should be rejected.

Howard presents yet another new argument by bluntly stating § 39-71-520(2), MCA, is not vague because "It required a claimant who disagreed with 'the determination by the department' to file an appeal within 60 days of the mailing of the mediator's report." *Appellant's Opening Brief* at 24. If the statute were so clear as to always require the claimant to file the petition, this situation would not have occurred. That is not, however, what the statute says. See, also, *Order* at ¶ 21, in which the WCC explains that the UEF would only have incentive to petition the WCC if the mediator's report becomes final. Otherwise, the UEF can never file a petition and see how many claimants fall into the procedural trap that snared Weidow.

This Court should affirm the WCC. As applied to the facts of this case, the language of § 39-71-520(2)(2005), MCA, failed to sufficiently define the conduct required of Weidow – a claimant who agreed with a determination made by a department mediator. Under the statute and the statute cross-referenced, he did not believe he had to file the petition. Further, as the WCC points out, the ambiguity in the statute is such that men of common intelligence must necessarily guess at its meaning. This is especially true in a system designed to run without reliance upon lawyers.

CONCLUSION

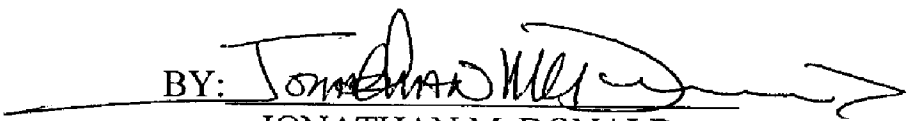
This Court should affirm the WCC on the issue of casual employment because this case is remarkably similar to *Colemore*. Howard had a "gain" in mind when he operated his Montana properties as business properties in order to reduce his overall federal income tax burden. His decision to list his properties on Schedule E of his federal income tax returns is a sworn representation to the IRS he had a profit motive in mind for those properties. Howard's complaint is, in essence, that the WCC should have favored his testimony regarding his subjective intents for the property over his objective acts in characterizing the property as rental-income property and taking business deductions. However, the WCC

decision was based upon substantial credible evidence – Howard's own tax returns. This Court should not overlook Howard's illegal behavior.

Jurisdictionally, the WCC was correct to retain jurisdiction given the unconstitutional vagueness of § 39-71-520(2)(2005), MCA. The statute fails to adequately specify which section of the Department of Labor and Industry's "determination" becomes final when no petition is filed to the WCC. The statute cross-referenced by § 39-71-520(2), MCA, affirmatively requires the party who disagrees with the mediator's report to file the petition to the WCC. The language of the statute failed to give Weidow adequate guidance as to what was required of him and necessitates injured workers guess at the statute's meaning. Further, given that the Legislature has corrected the ambiguity, that body presumably found ambiguity as well.

RESPECTFULLY SUBMITTED this 28th day of June, 2010.

DIX, HUNT & McDONALD

BY: 

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief was prepared in compliance with this Court's amendments to Rule 27 of the Montana Rules of Appellate Procedure. The brief is proportionally spaced using 14 point Times New Roman font and contains 9,479 words, per WordPerfect® Document Info.

DATED this 28th day of June, 2010.

DIX, HUNT & McDONALD

BY: _____
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CERTIFICATE OF MAILING

I hereby certify that on the 28th day of June, 2010, I mailed a true and accurate copy of the foregoing, postage pre-paid, to the following:

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